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No. 86-2014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT BOWIE JOHNSON, JR.,
Petitioner,

v.

KALMAN R. HETTLEMAN, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS KALMAN R. HETTLEMAN AND LUTHER STARNES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the courts below hold correctly that respondents were entitled to summary judgment when the undisputed material facts proved that they took no unlawful actions, but only exercised their First Amendment rights when they expressed their views in opposition to those of the petitioner on a matter of public importance?

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No. 86-2014

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ROBERT BOWIE JOHNSON, JR.,

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KALMAN R. HETTLEMAN, et al.,

Respondents.

COUNTER-STATEMENT OF THE CASE

Petitioner Robert Bowie Johnson, Jr. brought this action on November 30, 1983, alleging that the defendants (now respondents) conspired to ban or suppress the sale of his board game, "Public Assistance: Why Bother Working for a Living?", in violation of his rights under the First, Fifth, Sixth and Fourteenth Amendments, and 42 U.S.C.

§§1983, 1985(3) and 1986. (App. at 13.)[1] Defendants included the respondents on whose behalf this Brief in Opposition is filed, the Honorable Kalman R. Hettleman, the former Secretary of the Maryland Department of Human Resources, and Luther Starnes, Secretary Hettleman's Public Affairs Officer.[2]

The United States District Court for the District of Maryland granted all defendants motions for summary judgment, holding that "there was not one shred of evidence that anybody was expressing anything but their personal view as to how despicable they

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[1] Citations in the form "App. at ___" are to the Appendix to the Petition for a Writ of Certiorari.

[2] The other defendants (now respondents) are private individuals and organizations, the National Association for the Advancement of Colored People (NAACP), the National Organization for Women (NOW), and the American Public Welfare Association (APWA), as well as officers and employees of these organizations.

thought his [petitioner's] game was. . . ." (App. at 119).

The United States Court of Appeals for the Fourth Circuit, in an unpublished unanimous per curiam opinion, affirmed. The Fourth Circuit held that petitioner "could not prove that the defendants, under color of state law, engaged in conduct that deprived him of his First Amendment rights."[3] (App. at 14) (citations omitted). The petition to this Court followed.

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[3] The Fourth Circuit also held that petitioner could not "prove that the defendants deprived him of a protected liberty interest or property interest under the Fifth and Fourteenth Amendments, [a]nd the Sixth Amendment has no application to Johnson's allegations. Johnson also failed to allege facts that would state a claim under 42 U.S.C. §1985(3). * * * [And] [a] §1986 claim depends entirely upon a valid §1985 claim." (App. at 14) (citations omitted.) Petitioner does not challenge any of these rulings.

REASONS FOR DENYING THE WRIT

The Petition Does Not Present A Single Substantial Federal Question. Indeed, The Petition Is Without Merit

The courts below recognized this case for what it is: totally lacking in merit. Certainly, therefore, this case does not deserve further review by this Court.[4] With respect to some defendants, petitioner was unable to establish any facts to prove "state action", and with respect to respondents Hettleman and Starnes, the two admitted state actors, he produced no evidence that they had "engaged in conduct that deprived him of his First Amendment rights." (App. at 14.)

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[4] In this Court, petitioner raises three questions not presented to the courts below. Compare Petition at i with App. at 13-15 and 117-120. These three questions are not addressed in this brief as they are not properly presented for review. See E.C. Dothard v. Rawlinson, 433 U.S. 321, 323 n.1 (1977).

Petitioner manufactured a game - "Public Assistance: Why Bother Working for a Living?" - that articulated in strong terms his negative views of public assistance recipients and public assistance agency administrators.[5] Unquestionably, petitioner's game and the views it expressed are protected by the First Amendment. See, e.g., Roth v. United States, 354 U.S. 476, 484 (1957) ("unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection

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[5] Petitioner describes his game as dealing "with alleged welfare chislers, able-bodied loafers, and liberal government bureaucrats who allegedly tolerate and encourage massive welfare fraud across the United States. . . ." Plaintiff's Complaint ¶V. See also, Hammerhead Enterprises, Inc. v. Brezenoff, 551 F.Supp. 1360, 1363, 1367 (S.D.N.Y. 1982) (describing petitioner's game and concluding that it was a "scurrilous and scathing attack on the welfare system and the beneficiaries thereof"), aff'd, 707 F.2d 33 (2nd Cir.), cert. denied 464 U.S. 892 (1983).

of [constitutional] guarantees"). What petitioner has never seemed to understand is that he is not the only person protected by the First Amendment. By contrast, this Court has held that the First Amendment's scope is comprehensive and that everyone, including government employees like Hettleman and Starnes, has First Amendment rights. See, e.g., Perry v. Sinderman, 408 U.S. 593 (1972).

Respondents have never denied that they expressed their opposition to petitioner's views of the public assistance system and of the people who rely upon that system for their survival. However, respondents' views are no less protected by the First Amendment than are those of the petitioner. Indeed, respondents' statements in opposition to petitioner's game "provide[] a sterling example of the 'robust debate' which lies at the core of the First Amendment." Hammerhead

Enterprises, Inc. v. Brezenoff, 707 F.2d 33, 35 (2nd Cir.), cert. denied, 464 U.S. 892 (1983), quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

Petitioner's present lawsuit in the District of Maryland is his second attempt to litigate his claim that the First Amendment protects his game from criticism and response. His earlier attempt, filed and tried in the Southern District of New York, was also rejected. Hammerhead Enterprises, Inc. v. Brezenoff, 551 F.Supp. 1362 (S.D.N.Y. 1982), aff'd, 707 F.2d 33 (2nd Cir.), cert. denied, 464 U.S. 892 (1983).[6] The Second Circuit rejected petitioner's theory that the

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[6] Thus, an altogether separate and totally valid basis for dismissal of the present action and denial of review in this Court is that petitioner's attempt to relitigate issues that have been so definitively decided against him violates the collateral estoppel doctrine. See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

First Amendment applies to him but not to others in terms that answer fully the present petition:

> Apparently, appellants believe the First Amendment shields their own critique from any form of official criticism. In our view, this approach would stand the Constitution on its head. The right to free speech guarantees that every citizen may, without fear of recrimination, openly and proudly object to established government policy. It does not immunize the challengers from reproach. Having boldly entered the flames of public discussion the First Amendment is specifically designed to kindle, appellants now seek our rescue from the sparks of controversy they ignited.

Hammerhead Enterprises, Inc., 707 F.2d at 35.

This case has caused unjustifiable expense to the respondents and the waste of scarce federal judicial resources.[7] The

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[7] This is particularly so because respondents, the lower courts, and now this Court are relitigating issues that received the careful attention and the strong and thoroughly well reasoned rejection in published opinions by the United States District Court for the Southern District of New York and the United States (cont'd)

courts below recognized correctly that petitioner's claims are without merit as they "stand the Constitution on its head." Id. at 35. Further review is plainly unwarranted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Court of Appeals for the Second Circuit in Hammerhead Enterprises, Inc.